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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

UNIVERSITY OF SOUTHERN
CALIFORNIA,

Plaintiff, Respondent,
and Cross-Appellant,

v.

DOHENY EYE INSTITUTE,

Defendant, Appellant,
and Cross-Respondent.

B283081

(Los Angeles County
Super. Ct. No. BC634309)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed in part; reversed in part and remanded with directions.

McGarrigle, Kenney & Zampello, Marianne Fratianne and Patrick C. McGarrigle for Defendant, Appellant and Cross-Respondent.

Gibson, Dunn & Crutcher, James P. Fogelman, Kahn A. Scolnick and Harper Gernet-Girard for Plaintiff, Respondent and Cross-Appellant.

INTRODUCTION

Appellant Doheny Eye Institute (Doheny or DEI) and cross-appellant the University of Southern California (USC) appeal from the trial court's

denial of their competing motions to compel arbitration of a cross-complaint filed by Doheny against USC. The events leading to the appeal are tortuous.

In 2004, USC sought to terminate the employment of Cheryl Craft, a professor employed by USC in the Ophthalmology Department of the Keck School of Medicine (KSOM). Doheny was affiliated with USC through a 1992 Affiliation Agreement, providing space and services for the Ophthalmology Department at KSOM. To avoid litigation with Craft (who threatened to sue for wrongful termination), USC drafted two settlement agreements, which were executed in 2004. One was between Craft and USC (USC/Craft Agreement), and the second was between Craft and Doheny (Doheny/Craft Agreement). Both agreements required arbitration of any dispute under American Arbitration Association (AAA) rules.

In 2011, USC filed an unrelated landlord/tenant action against Doheny. That action was settled by a settlement agreement in 2013 (2013 Agreement). Because the 1992 Affiliation Agreement between USC and Doheny had expired in December 2012, the 2013 Agreement also contained provisions regarding the parameters of the ongoing operations between USC and Doheny pending the execution of a new affiliation agreement. The 2013 Agreement required arbitration of any dispute under JAMS rules.

In 2015, Craft initiated an arbitration before the AAA against Doheny (Craft Arbitration), alleging that Doheny breached its obligations to her under the Doheny/Craft agreement. Doheny then filed a counterclaim in that arbitration against USC for indemnity and other claims, contending that USC breached the 2013 Agreement.

USC objected to participating in the arbitration, contending that the 2013 Agreement required arbitration of Doheny's counterclaims under JAMS rules. The AAA arbitrator overruled the objection, and USC initially

participated in the Craft Arbitration. However, in September 2016, USC filed a complaint in the superior court against Doheny for breach of contract and injunctive and declaratory relief. Based on the arbitration clause in the 2013 Agreement, USC sought to enjoin the AAA from arbitrating Doheny's counterclaims against USC, and to require JAMS arbitration. Doheny filed a cross-complaint in the superior court alleging various causes of action, seeking to compel USC to participate in the Craft Arbitration, as well as seeking indemnity for costs and damages Doheny might incur in the Craft Arbitration.

Doheny then moved to compel arbitration of its cross-complaint before the AAA, and USC filed a competing motion to compel arbitration of Doheny's cross-complaint before JAMS. The superior court denied both motions, and both parties appealed.

In Doheny's appeal, we affirm the trial court's ruling. First, we conclude that the plain language of the arbitration clause in Doheny/Craft Agreement provides that the clause applies only to disputes between Craft and Doheny. Therefore, the interpretive doctrine that contemporaneous agreements should be construed together does not mean that USC can be compelled to arbitrate before the AAA under the arbitration clause in that agreement. Second, we likewise conclude that third party beneficiary principles do not entitle Doheny to compel arbitration under the Doheny/Craft and USC/Craft Agreements. Third, we reject Doheny's contention that USC is equitably estopped from denying it was bound by the arbitration clauses in the Doheny/Craft and USC/Craft Agreements. Finally, we find no legal basis for Doheny's contention that the prejudice it might suffer by relitigating before JAMS issues on which it already prevailed in the Craft Arbitration is a basis to compel USC to accept AAA arbitration.

In USC's cross-appeal, we reverse the trial court's denial of USC's motion to compel arbitration before JAMS. The claims in Doheny's cross-complaint against USC have their roots in the 2013 Agreement, and therefore the arbitration clause of that agreement applies to compel JAMS arbitration. We remand the case to the superior court to enter a new order granting USC's motion to compel arbitration.

BACKGROUND

1992 Affiliation Agreement Between USC and Doheny

On December 29, 1992, Steven Sample, then President of USC, and J.S. Webb, then Chairman of the Board of Directors of Doheny, executed an Affiliation Agreement (there had been a previous 17-year affiliation between the parties). The goal was to “develop[] the premiere department of ophthalmology in the setting of a medical school of the first rank.” Under the agreement, Doheny was to provide financial support and various facilities for USC's Department of Ophthalmology. Included in that support was Doheny's obligation to “[p]rovide and manage endowments for one or more chairs in ophthalmology,” provide operating rooms and hospital facilities, and “[h]ire and support faculty ophthalmologists where USC is unable to provide immediate funding.”

Among USC's obligations was the requirement to “[p]rovide base salaries and fringe benefits for USC faculty and ophthalmologists (clinicians) and staff,” who would supervise and train residents, be responsible for patient care, and perform research. The Affiliation Agreement provided that it would expire after 20 years, at the end of December 2012.

2004 Craft Settlement Agreements

Cheryl Craft was the Chair of the Department of Cell and Neurobiology at KSOM, and conducted vision-related research in the Department of Ophthalmology. Doheny provided financial support to USC for Craft's research. In 2004, USC sought to terminate Craft's employment based on her alleged poor performance as Cell and Neurobiology Chair. When Craft threatened to sue USC for wrongful termination, Craft and USC began settlement discussions.

Zach Hall, Senior Associate Dean for Research at KSOM, emailed Craft on January 26, 2004, stating "I have spoken to all concerned at this end, and everyone seems to think that having Doheny as a signatory would be a good idea. We don't yet know who would sign on their behalf, so the document has not been altered to reflect this. [¶] I will discuss the other matters with the university attorney as well and get back to you."

On February 18, 2004, James Ball, USC's University Counsel, sent Craft's attorney redlined versions of an agreement between Craft and USC and a separate agreement between Craft and Doheny for Craft to review. On February 20, 2004, Ball emailed Craft's attorney revised agreements, stating that "we have included the various ways that Dr. Craft might cease being a professor in the Department of Ophthalmology. I think these descriptions are consistent with your request. You will note that Doheny has agreed to add language regarding the policies and practices as they apply to the Mary D. Allen endowment. [¶] Please have Dr. Craft sign clean versions of these redlined versions and send those signed agreements to me for USC and Doheny signatures."

On February 24, 2004, the USC/Craft Agreement and the Doheny/Craft Agreement were fully executed by the parties. Both agreements stated that Craft was employed by USC as a tenured professor at

KSOM and served as the Chair of the Department of Cell and Neurobiology. Both also stated that they were entered into for the following purpose: “WHEREAS, Dr. Craft and the University would like to end Dr. Craft’s administrative position as Chair in a mutually satisfactory manner.”

With respect to Doheny’s obligations under the Doheny/Craft Agreement, the agreement provided: (1) “[Doheny] retains control of the Mary D. Allen Endowment Account and the Doheny Eye Institute facilities, including lab space used by Dr. Craft”; (2) to support vision research at KSOM and Doheny, Craft would continue to hold the title of the Mary D. Allen Chair and have access to Mary D. Allen Endowment Interest to support her university salary and to laboratory space at the Doheny Vision Research Center as long as she was “engaged in full-time active service at the KSOM”; and (3) while Craft held the “Mary D. Allen Chair at [Doheny], and where permitted by the terms of the Mary D. Allen Endowment and by the policies of Doheny, Dr. Craft may use Allen Endowment Interest to support her University salary.” The agreement stated that these benefits “shall constitute the sole and exclusive financial obligations of [Doheny] . . . to Dr. Craft under this Agreement, or in connection with Dr. Craft’s employment . . . , continuing relationship with [Doheny], or resignation from the Chair position.”

With respect to USC’s obligations, the USC/Craft Agreement provided: (1) USC would continue to pay Craft her annual base salary and her administrative stipend for the fiscal year 2003-2004 and allow her access and/or control of various funds as long as she was “a faculty member and engaged in full-time active service at the KSOM”; (2) while Craft held “the Mary D. Allen Chair, and where permitted by the terms of the Mary D. Allen Endowment and by [Doheny], Dr. Craft may support her salary with Allen

Endowment Interest”; (3) if Craft’s laboratories at the Doheny Vision Research Center “become unavailable [to Dr. Craft] for reasons beyond the control of [Doheny] or KSOM, then KSOM shall use reasonable efforts to provide to Dr. Craft a substantially equivalent parking space.” As for Craft, the USC/Craft Agreement required Craft to resign as Chair of the Department of Cell and Neurobiology in the KSOM.

Concerning arbitration, the Doheny/Craft and USC/Craft Agreements contained identical provisions: “The Parties hereby agree to submit any claim or dispute arising out of or relating to the terms of this Agreement to private and confidential arbitration by a single neutral arbitrator in Los Angeles, California. Subject to the terms of this paragraph, the arbitration proceedings shall be governed by the then-current employment arbitration rules and procedures of the American Arbitration Association (‘AAA’). The decision of the arbitrator shall be final and binding on all Parties to this Agreement, and judgment thereon may be entered in any court of competent jurisdiction. This arbitration procedure is intended to be the sole and exclusive method of resolving any claim arising out of or relating to this Agreement.”

The two agreements also contained corresponding release provisions. Under the Doheny/Craft Agreement, Craft agreed to release claims against Doheny and its “successors, assigns, agents, . . . affiliates . . . , including but not limited to the University.” The USC/Craft Agreement similarly required Craft to release claims “against the University, each of its successors, assigns, agents, . . . affiliates . . . , including but not limited to the Doheny Eye Institute.”

June 2004 Letter

On June 1, 2004, Stephen Ryan, Dean of KSOM, and Hall wrote a letter (June 2004 letter) to Dr. Ronald Smith, Professor and Chairman of the USC Department of Ophthalmology and Vice President of Doheny, reassuring Doheny that USC considered itself responsible for KSOM's financial and other obligations to Craft. The letter stated in pertinent part, "We are writing to reassure you that all KSOM commitments to Dr. Craft, including tenure, financial, and others are the responsibility of the Keck School of Medicine. We appreciate [Doheny's] willingness to help the School deal with the resignation of Dr. Craft. Current and future leaders and administrators of KSOM must understand our agreements related to the transfer of Dr. Craft's primary appointment to your Department. [¶] . . . Due to the unique circumstances of her transfer to your Department, all responsibilities for Dr. Craft's laboratory, personnel, etc. belong to the Keck School of Medicine, and specifically not the Department of Ophthalmology and not the Doheny Eye Institute."

2013 Settlement Agreement Between USC and Doheny

In November 2010, Doheny leased a building (the Doheny Eye Institute) in the City of Los Angeles to USC under the terms of a written lease. After a dispute arose, in October 2011, USC filed a landlord/tenant action against Doheny.

In May 2013, USC and Doheny reached a settlement agreement (2013 Agreement). The stated purpose was to settle the October 2011 landlord/tenant action filed by USC against Doheny.¹ However, by then, the

¹ The recitals in the 2013 Agreement stated, "Without any admission of fault or liability, the Parties desire to fully and forever settle and resolve the Action [defined as the landlord/tenant complaint in case No. BC 472246] including all Claims and Cross Claims and to provide releases to one another

1992 Affiliation Agreement between USC and Doheny had expired at the end of 2012. Therefore, the 2013 Agreement also contained provisions addressing “Ongoing Operating Parameters,” in which the parties acknowledged that Doheny “has been providing certain services to USC,” and agreed that if Doheny was to continue to provide services, a new contract would be negotiated and signed. The section entitled “Voluntary Mediation of Ongoing Operating Parameters” required the parties to meet at least one time with a JAMS mediator to discuss “Ongoing Operating Parameters.” “Ongoing Operating Parameters” included topics such as whether USC faculty “will continue to perform work funded by Doheny grants,” and “Doheny’s willingness to provide any further post-affiliation support for USC’s department of ophthalmology, including faculty salaries.” The parties agreed that none of these issues “will result in financial payments or other legal or binding obligations whatsoever between USC and Doheny except to the extent USC and Doheny voluntarily choose to make any payment in their respective sole and absolute discretion or voluntarily choose to enter into a contract for a new legal or binding obligation in their respective sole and absolute discretion.” The 2004 dispute with Craft is not mentioned in the 2013 Agreement.

In Paragraph 24, “Governing Law and Dispute Resolution,” the agreement contained an arbitration clause: “Except as expressly provided in this Agreement or in the Related Agreements, any dispute respecting the terms or enforcement of this Agreement and the Parkview Purchase and Sale

as provided in this Agreement, all on the terms and subject to the conditions set forth herein.”

Agreement shall be resolved by final, binding arbitration pursuant to the JAMS Rules in effect at the time.”²

2015 Craft Demand for Arbitration Against Doheny

In February 2014, Craft’s attorney wrote a letter to USC, stating that USC owed rent on Craft’s laboratory space at Doheny. He asked USC to pay the rent “as previously agreed upon by USC and [Doheny],” and requested that USC provide space at KSOM if USC was unwilling to make the rent payments.

USC assisted Craft in drafting a joint letter to Doheny, asking Doheny to make funds available to Craft. In a June 2014 letter, Judy Garner, USC’s Vice Dean for Faculty Affairs, informed Craft that USC would not pay Craft her \$7000 per month stipend unless Doheny provided the funding or Craft obtained an outside grant. Garner encouraged Craft to ask Doheny to restore the funding to her.

In August 2015, Craft filed her demand for AAA arbitration against Doheny. Craft alleged that Doheny breached the Doheny/Craft Agreement by: (1) ceasing to pay her interest from the Mary D. Allen Endowment as of December 31, 2012, (2) forcing her to vacate laboratory space at Doheny in 2014 as a result of a dispute between Doheny and USC, and (3) preventing her from continuing to hold the title of Mary D. Allen Chair. As relief, she sought to continue to hold the title of Mary D. Allen Chair, and to recover damages of not less than \$350,000, as well as attorney fees and costs.

² The Related Agreements were “the Parking Covenant . . . , the Parking Agreement . . . , the First Amendment . . . , the Parkview Purchase and Sale Agreement . . . , and USC’s Mutual General Releases with Patrick McGarrigle and Marissa Goldberg.”

In its answer, Doheny denied Craft's allegations. In January 2016, it filed a counterclaim against USC, and a demand for arbitration against USC. In the counterclaim, Doheny alleged that under the 2013 Agreement, Doheny was entitled to discontinue support of the Department of Ophthalmology, with the exception of having to pay USC up to \$200,000 to support certain faculty salary and benefits for the period May 1, 2013 through September 30, 2013, which included support for Craft. Doheny made its last payment related to Craft as required by the 2013 Agreement. Doheny alleged three causes of action. In the first, Doheny alleged that USC breached the 2013 Agreement because "Dr. Craft's Arbitration Claim seeks post-Affiliation Agreement and post-2013 Settlement support—purportedly for herself, but actually at the behest of, on behalf of, and for the benefit of USC—in violation of the 2013 Settlement. [¶] . . . On November 21, 2015, DEI demanded that USC cause the Craft Arbitration to be dismissed, notified USC that the Craft Arbitration constitutes a breach by USC of the 2013 Settlement, and demanded that USC defend, indemnify, and hold DEI harmless from the Craft Arbitration/Craft Claims. USC has not responded to or accepted Doheny's demand and has, therefore, breached the 2013 Settlement." In the remaining causes of action, Doheny sought defense and indemnity from USC, a declaration of entitlement to indemnity, and reimbursement for unjust enrichment.

USC objected to the jurisdiction of the AAA over Doheny's cross-demand for arbitration, stating that the 2013 Agreement required arbitration of disputes under JAMS rules. In March 2016, the AAA arbitrator denied USC's objection to jurisdiction. USC participated in the arbitration

proceedings, including discovery and the scheduling of depositions, until September 2016.³

2016 USC Superior Court Complaint

On September 12, 2016, USC informed Doheny that it no longer was willing to participate in the Craft Arbitration. Instead, USC filed the instant action in the Los Angeles Superior Court on September 16, 2016, asserting three causes of action: declaratory relief, injunctive relief, and breach of contract.

USC alleged that it brought the action because Craft's claim in the Craft Arbitration before the AAA involved only the Doheny/Craft Agreement, to which USC was not a party. However, Doheny filed counterclaims against USC in that arbitration, alleging that USC breached the 2013 Agreement. USC alleged that the filing of those counterclaims in the Craft Arbitration before the AAA breached the arbitration clause of the 2013 Agreement, which required arbitration before JAMS. USC alleged Doheny was required to file a motion in the superior court to compel USC to arbitrate Doheny's claims against USC, but did not. Further, the AAA arbitrator had no authority to determine whether USC was required to arbitrate in that forum, and USC had been forced to participate, incurring considerable expenses.

In its declaratory relief cause of action, USC sought a declaration that, in substance, USC was not required to participate in the Craft Arbitration, that Doheny breached the 2013 Agreement by filing its counterclaims against

³ On September 26, 2016, Doheny requested leave from the arbitrator to file an amended counterclaim, asserting that USC had recently produced the June 2004 Letter from Hall and Ryan to Smith, which "confirms that USC agreed that all commitments to Dr. Craft, including financial commitments, were the responsibility of KSOM and not that of Doheny."

USC in that arbitration, and that any claim by Doheny that USC breached the 2013 Agreement must be arbitrated before JAMS. In its cause of action for injunctive relief, USC sought an injunction barring Doheny from pursuing any claims against USC in the Craft Arbitration. In its cause of action for breach of contract, USC alleged that Doheny breached the arbitration clause of the 2013 Agreement. The cause of action itself alleged no damages: it alleged only that USC was “suffering and will continue to suffer as a result of [Doheny’s] breach” of the 2013 Agreement. In its prayer for relief USC sought, inter alia, attorney fees, costs, and arbitration fees resulting from Doheny’s breach.

In November 2016, Doheny filed a motion to compel arbitration in the superior court, seeking to compel USC’s continued participation in the Craft Arbitration. The superior court denied Doheny’s motion.

Doheny’s Cross-Complaint

On January 20, 2017, Doheny filed a cross-complaint against USC in the superior court for declaratory relief, breach of contract, promissory estoppel, breach of contract, and indemnity for tort of another. It also contained a single claim for unfair competition against Craft alone. At issue in this appeal is whether and before which organization (AAA or JAMS) this cross-complaint must be arbitrated. USC’s complaint is not before us.

According to the cross-complaint, USC and Craft had colluded “to bully Doheny into submission” to Craft’s demands. In an effort by USC “to shift to Doheny any responsibility under the 2004 Craft Settlement and renege on the representations USC made to Doheny at the time of the 2004 Craft Settlement (as expressly stated in the June 2004 Letter),” USC discontinued its financial support of Craft after Doheny’s final support payment to USC

under the 2013 Agreement, and then encouraged Craft to file a claim against Doheny for alleged breaches of the Doheny/Craft Agreement. Doheny explained that its purpose in filing the cross-complaint was “to ask the Court to order that all the parties to the 2004 Craft Settlement participate in a single, unified proceeding before AAA (or, should Doheny’s [renewed] Motion to Compel Arbitration not be granted, in one unified proceeding before the Superior Court) to adjudicate the parties’ rights and obligations under the 2004 Craft Settlement, as intended by the parties when USC drafted, negotiated and executed the 2004 Craft Settlement and solicited Doheny to be a party thereto.”

In its first cause of action for declaratory relief, Doheny sought a declaration of the rights and responsibilities of: (1) Doheny as a third party beneficiary of the USC/Craft Agreement; (2) USC as a third party beneficiary of the Doheny/Craft Agreement; (3) USC as a signatory to the USC/Craft Agreement; and (4) Craft as a signatory to both the Doheny/Craft and USC/Craft Agreements.

In the second cause of action for breach of contract, Doheny alleged that USC agreed in the “2004 Craft Settlement” and in the Ryan Letter of June 2004 to be responsible for any benefits to Craft under the “2004 Craft Settlement.” Doheny alleged USC breached the Ryan Letter and the “2004 Craft Settlement” (viewing the Doheny/Craft and USC/Craft Agreements as a single contract, as well as Doheny being a third party beneficiary of the USC/Craft Agreement) by, among other things, (1) “failing, to the extent that Craft is entitled to any benefits from Doheny (which she is not), to provide to Craft the benefits of the” USC/Craft Agreement, (2) “encouraging Craft to sue Doheny,” (3) “falsely asserting” that the Doheny/Craft Agreement “is a stand-alone agreement” and that “Doheny is obligated (notwithstanding that

expiration of the Affiliation Agreement, the June 2004 Letter and USC's express obligations in the USC-Craft Component Agreement of the 2004 Craft Settlement, etc.) to provide support (directly or otherwise) to USC's faculty member, Craft." Doheny sought damages, including its attorney fees and costs, and "[i]n the event that Craft prevails in the Craft Arbitration, any monetary and/or non-monetary relief actually awarded to Craft."

In its cause of action for promissory estoppel, Doheny alleged that in entering the 2004 Craft Settlement, it relied to its detriment on USC's promise to be responsible for the support of Craft for which Doheny might be responsible under the Doheny/Craft Agreement. That representation was later incorporated into the Ryan letter. Seeking the same damages as in the claim for breach of contract, Doheny alleged that USC was "estopped to deny its representations and corresponding obligations to Doheny resulting from those representations." (*Italics deleted.*)

In its cause of action for indemnity, Doheny alleged that it was a third party beneficiary of the USC/Craft Agreement, that USC refused Doheny's request for defense and indemnity in the Craft Arbitration, and that by doing so (as well as engaging in other conduct alleged in the breach of contract claim) USC "breached its obligations under the 2004 Craft Settlement and the June 2004 Letter." Doheny sought indemnity for its attorney fees and costs and for any relief Craft might receive in the Craft Arbitration.

In the fifth cause of action for "Tort (Fraud) of Another," Doheny alleged that it relied on USC's intentionally false representations that USC, not Doheny, would be responsible for any benefits Craft received in the 2004 Craft Settlement. Doheny alleged that as a proximate result, it suffered

damage, including its attorney fees and costs and any relief Craft might receive from Doheny. Doheny also sought punitive damages.⁴

Cross-Motions to Compel Arbitration

Doheny sought reconsideration of the superior court's January order denying its motion to compel arbitration, and moved to compel arbitration of its cross-complaint before AAA. USC cross-moved to compel arbitration of Doheny's cross-complaint before JAMS.

On May 15, 2017, the trial court denied both motions to compel. Addressing USC's motion to compel arbitration of the cross-complaint before JAMS, the trial court stated that USC's motion was based on Section 24 of the 2013 Agreement, which provided for arbitration of disputes under JAMS rules. However, the court reasoned that the dispute at issue was not covered by the 2013 Agreement, which "purports to resolve the dispute raised in University of Southern California v. Doheny Eye Institute, Case No. BC472246 regarding the lease between Doheny Eye Institute as landlord and USC as tenant for the Doheny Eye Institute building. [Citation.] There is no mention of Cheryl Mae Craft's employment in the 2013 Settlement

⁴ Doheny alleged a sixth cause of action for "False Association/Unfair Competition under the Lanham Act" against Craft alone. Doheny alleged that Doheny was "the owner and/or holder of several valuable trademarks, including, but not limited to, the 'Doheny Eye Institute,' the 'Mary D. Allen Endowment,' and the 'Mary D. Allen Endowed Chair for Vision Research,' which are protectable under 15 U.S.C. § 1225." However, "claiming rights to use Doheny's intellectual property under the 2004 Craft Settlement, including the [USC/Craft Agreement], Craft [illegally] continues to associate herself with Doheny, including by continuing to claim on the Internet that she is the 'Executive Director of the Mary D. Allen Laboratories for Vision Research and a Senior Scientist at the Doheny Eye Institute' and still holds 'the Mary D. Allen Endowed Chair for Vision Research at the Doheny Eye Institute.'"

Agreement.” Because the dispute regarding Craft’s support and funding is “a completely distinct dispute than that resolved in the 2013 Settlement Agreement,” the court denied USC’s motion to compel arbitration of the cross-complaint before JAMS.

Regarding Doheny’s motion to compel arbitration of the cross-complaint before AAA, the trial court reasoned that Doheny failed to point to a written arbitration agreement between USC and Doheny. Doheny relied on the June 2004 letter, which stated that “all responsibilities for Dr. Craft’s laboratory, personnel, etc. belong to the Keck School of Medicine, and specifically not the Department of Ophthalmology and not the Doheny Eye Institute.” However, the court concluded that the June 2004 Letter constituted a separate agreement from the Craft settlement agreements, reasoning that the letter was written three months after the February 2004 Craft agreements were executed and did not reference the agreements. Because the June 2004 Letter did not contain an arbitration clause, the court concluded there was no reason to compel arbitration based on the June 2004 Letter. The superior court also rejected Doheny’s attempts to enforce the Doheny/Craft Agreement against USC under the theories of promissory estoppel and third party beneficiary. Doheny appealed, and USC cross-appealed.

Intervening Events

In the meantime, on November 9, 2017, the AAA arbitrator found in favor of Doheny on Craft’s claims, and in favor of Doheny in its counter-claims against Craft. In December 2017, the trial court confirmed the arbitration award and entered judgment in favor of Doheny. Craft is not a party to this appeal.

As we have noted, the only issue in this appeal is whether the trial court erred in denying Doheny's and USC's cross-motions to compel arbitration of Doheny's cross-complaint. There is no issue pending before us regarding USC's complaint. Because: (1) the AAA arbitration of Craft's claim against Doheny was reduced to a judgment in Doheny's favor, (2) the thrust of Doheny's cross-complaint seemed to be indemnity from USC for any relief Craft received (which was none), and (3) in their appellate briefing the parties did not discuss what claims remained for which we could grant effective relief on appeal, we asked for supplemental briefing to explain why the appeal and cross-appeal are not moot.

In response, Doheny asserted that it continues to pursue its claims in the cross-complaint and seek damages from USC for Doheny's legal fees, costs and other expenses incurred in the Craft Arbitration. Doheny also noted that USC's complaint sought its costs in the Craft Arbitration as damages for breach of the 2013 Settlement Agreement. However, there is no issue before us relating to USC's complaint. For its part, USC informed us that as long as Doheny continues to press its claims, the appeal and cross-appeal are not moot. Given that it appears Doheny wishes to move ahead with claims for damages against USC that remain unresolved, we determine that the appeal and cross-appeal are not moot.

DISCUSSION

I. *Doheny's Appeal*

Doheny appeals from the order denying its motion to compel arbitration of its cross-complaint, relying on the arbitration clause of the Doheny/Craft

Agreement and USC/Craft Agreements.⁵ “‘The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement.’ [Citations.]” (*Cohen v. TNP 2008 Participating Notes Program, LLC* (2019) 31 Cal.App.5th 840, 859.) “Public policy favors contractual arbitration as a means of resolving disputes. [Citation.] But that policy “‘does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration.’” [Citation.]” (*Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047, 1057.)

USC was not a party to the Doheny/Craft Agreement, and Doheny was not a party to the USC/Craft Agreement. Therefore, to invoke the arbitration clause in one or both of the agreements, Doheny relies on doctrines that do not require identical parties. It contends: (1) under the interpretive rule of construing separate writings evidencing one transaction together, the Doheny/Craft Agreement and USC/Craft Agreement must be construed as

⁵ Based on the doctrine of law of the case, USC contends that Doheny waived its single contract, third-party beneficiary, and estoppel arguments by failing to appeal the trial court’s January 5, 2017 order. We disagree. “Under the law of the case doctrine, when an *appellate court* “states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case’s] subsequent progress, both in the lower court and upon subsequent appeal” [Citation.]” (*People v. Barragan* (2004) 32 Cal.4th 236, 246, *italics added*.) Because there was no prior appellate opinion, the law of the case doctrine is inapplicable. As the trial court reasoned in the May 15, 2017 order at issue, “[u]ntil entry of judgment, the court retains complete power to change its decision as the court may determine; it may change its conclusions of law or findings of fact.” (*Nave v. Taggart* (1995) 34 Cal.App.4th 1173, 1177.) USC’s reliance on *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 551, footnote 33, is inapposite. The issue in *Ferraro* was “[t]he preclusive effects of a prior judgment or similar adjudication—traditionally known as *res judicata*.” (*Id.* at p. 530.) *Res judicata* is not at issue here.

one contract, and therefore the arbitration clause of the Doheny/Craft Agreement applies to non-signatory USC, and compels USC to arbitrate Doheny's cross-complaint before the AAA; (2) third party beneficiary principles entitle Doheny to compel USC to arbitrate under the arbitration clauses of the Doheny/Craft and USC/Craft Agreements; (3) USC is equitably estopped from denying that it was subject to the AAA arbitration provisions; and (4) having prevailed against Craft in the AAA arbitration proceeding, Doheny would suffer prejudice if it had to litigate its related claims against USC in a new arbitration before JAMS. None of these contentions has merit.

The standard of review is settled: "When 'the language of an arbitration provision is not in dispute, the trial court's decision as to arbitrability is subject to de novo review.' [Citation.] Thus, in cases where 'no conflicting extrinsic evidence is introduced to aid the interpretation of an agreement to arbitrate, the Court of Appeal reviews de novo a trial court's ruling on a petition to compel arbitration.' [Citation.]" (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 707.)

A. *Doheny/Craft and USC/Craft Agreements as a Single Contract*

Doheny asserts that the Doheny/Craft and USC/Craft Agreements form a single contract with reciprocal arbitration clauses that bind USC. We disagree.

Civil Code section 1642 provides: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Decisional law has declared the statute to be a declaration of broader common law principles, and thus has applied the doctrine of joint interpretation to agreements and other writings not involving identical parties. (*Cadigan v. American Trust Co.* (1955) 131

Cal.App.2d 780, 786-787 (*Cadigan*); see *Fuentes v. TMCSF, Inc.* (2018) 26 Cal.App.5th 541, 548 (*Fuentes*) [“More generally, . . . ‘where two or more written instruments are executed contemporaneously, with reference to each other, for the purpose of attaining a preconceived objective, they must all be construed together and effect given if possible to the purpose intended to be accomplished; and this principle controls whether each of the several instruments was signed by all or only some of the parties to the transaction. [Citation.]’ [Citation.]”]; (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1320 (*Holguin*) [““It is a general rule that several papers relating to the same subject-matter and executed as parts of substantially one transaction, are to be construed together as one contract [citations].” [Citations.] [¶] ‘The general principle of joint consideration of several instruments as one agreement is applicable whether they expressly refer to each other [citations], or it appears from extrinsic evidence that they were executed as a part of one transaction.’ [Citation.]”])

This is a principle of contract interpretation, not a rigid rule compelling the conclusion that the separate agreements or writings so construed must be taken as a single contract with overarching binding terms. (See *Merkeley v. Fisk* (1919) 179 Cal. 748, 754 [“resort may be had to extrinsic evidence which will show the circumstances under which the several instruments were made for the purpose of ascertaining the intention of the parties concerning the scope and effect of the several instruments”].) Here, we agree as a general matter that the Doheny/Craft and USC/Craft Agreements should be construed together. Both agreements stated that they were executed to terminate Craft’s “administrative position as Chair in a mutually satisfactory manner.” During Craft’s discussions with USC before the agreement was executed, Hall, a Dean in KSOM, informed Craft that “everyone” thought

that “having [Doheny] as a signatory would be a good idea.” USC thus requested Doheny’s involvement, negotiated the terms of the agreements, and drafted both agreements. The June 2004 Letter also refers to the agreements, stating that “[c]urrent and future leaders and administrators of KSOM must understand our agreements related to the transfer of Dr. Craft’s primary appointment to your Department.”⁶ Although written after the Craft Agreements, the June 2004 letter is a proper matter to consider in construing the agreements. (*Cadigan, supra*, 131 Cal.App.2d at p. 786 [“In some of the cases, it is true, the rule is expressed in terms of written instruments executed ‘contemporaneously’ or ‘at the same time’ but we do not infer therefrom an intent to limit the rule to cases in which the instruments are executed on the same day or within any arbitrarily prescribed period of time”].)

But that the Doheny/Craft and USC/Craft Agreements must be construed together does not inevitably lead to the conclusion that under the arbitration clauses in those agreements, Doheny can compel USC to submit to AAA arbitration of Doheny’s cross-complaint. ““While it is the rule that several contracts relating to the same matters are to be construed together [citation], it does not follow that for all purposes they constitute one contract.” [Citation.] The rule is simply a particular application of the more general principle that ‘[w]e construe [a] contract in light of the circumstances under which it was made. . . . [Citation.]’ [Citation.]” (*Fuentes, supra*, 26

⁶ For this reason, we disagree with the trial court’s conclusion that the June 2004 letter constituted a separate agreement from the two settlement agreements with Craft. Contrary to the trial court’s reasoning, the letter does refer to the Craft settlement agreements, and was intended to “reassure” Doheny that any commitments to Craft “are the responsibility of the Keck School of Medicine.”

Cal.App.5th at p. 548.) The ultimate goal of the principle is no different than any of the other doctrines governing the interpretation of contracts: to effectuate the intent of the parties. Thus, the principle of construing agreements arising from a single transaction as a whole does not mean that a “discrete term contained in one agreement is necessarily applicable to the parties to one of the other agreements.’ [Citation.]” (*Id.* at p. 549.)

Fuentes is instructive. There, the plaintiff entered a written purchase agreement to buy a motorcycle from the defendant dealer. The agreement did not contain an arbitration clause. At the same time, the plaintiff entered a separate security agreement with a bank to finance the purchase, which did contain an arbitration clause. The plaintiff later sued the defendant dealer in a putative class action for false advertising and other claims. Although not a party to the plaintiff’s security agreement with the bank, the defendant dealer moved to compel arbitration based on that agreement. The court of appeal affirmed the trial court’s denial of the motion. In relevant part, the court rejected the defendant dealer’s contention that construing the purchase and security agreements together necessarily meant that the dealer could compel arbitration of the plaintiff’s claims under the purchase contract based on the arbitration clause of the security agreement. The court explained that the parties’ intent ““is to be inferred, if possible, solely from the written provisions of the contract.” [Citations.] “If contractual language is clear and explicit, it governs.” [Citation.]’ [Citation.]” (*Fuentes, supra*, 26 Cal.App.5th at p. 549.) “The arbitration clause [of the security agreement] itself specified the entities to which it applied,” and the defendant was “not a party to the arbitration clause and was not a nonparty expressly specified as able to invoke the arbitration clause.” (*Ibid.*)

By analogy here, USC is not a party to the arbitration clause in the Doheny/Craft Agreement. That clause provides: “*The Parties* hereby agree to submit any claim or dispute arising out of or relating to the terms of *this Agreement* to private and confidential arbitration by a single neutral arbitrator in Los Angeles, California” before the AAA. (Italics added.) The Doheny/Craft Agreement unambiguously defines the “parties” as Doheny and Craft: “This Confidential Settlement Agreement and General Release (the ‘Agreement’) is made by and between Dr. Cheryl Craft (‘Dr. Craft’), on the one hand, and the Doheny Eye Institute (the ‘DEI’), on the other hand, as of the date(s) signed below. The parties to this Agreement are collectively referred to as the ‘Parties’ and singularly as a ‘Party.’” As in *Fuentes*, the contractual language specifies to whom the arbitration clause applies—“The Parties,” meaning Doheny and Craft. Construing the Doheny/Craft Agreement and the USC/Craft agreements together as a principle of contractual interpretation does not change that fact. USC is not a party to the arbitration agreement, and cannot be compelled to arbitrate simply because the Doheny/Craft and USC/Craft Agreement should be read together.⁷

Doheny relies on *Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667 (*Brookwood*), but we find the decision inapplicable. In *Brookwood*, the plaintiff was employed as an investment specialist by both Bank of America (Bank) and BA Investment Services (BAIS, “A BankAmerica Company”). (*Id.* at p. 1670, fn. 1.) She signed separate agreements with BAIS (“a registered representative agreement”) and the Bank (an employment

⁷ Whether Doheny can compel USC to arbitrate under third party beneficiary principles is a different question. We discuss that issue in the next section of our opinion, section IB.

agreement), both of which acknowledged her dual employment. Further, she transferred her registration with the National Association of Securities Dealers, Inc. (NASD) to BAIS by executing a “U-4 form.” Both the registered representative agreement with BAIS and the U-4 form contained arbitration clauses. However, the employment agreement with the Bank did not. The employment agreement also had an integration clause stating that the agreement was the complete agreement between the plaintiff and the Bank. (*Id.* at pp. 1671-1672.)

After the plaintiff sued the Bank and BAIS for wrongful termination, they moved to compel arbitration. The trial court granted the motion, and the court of appeal affirmed. (*Brookwood, supra*, 45 Cal.App.4th at pp. 1672-1676.) As here relevant, the plaintiff argued on appeal that as to the Bank, she had no arbitration agreement: her employment agreement with the Bank did not contain an arbitration clause, and had an integration clause declaring the agreement to be the entire contract between her and the Bank. (*Id.* at p. 1675.) The appellate court found the “[p]laintiff’s analysis is erroneous.” (*Ibid.*) It reasoned: “Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.’ (Civ. Code, § 1642.) Whether Civil Code section 1642 applies in a particular case is a question of fact for resolution by the trial court. [Citation.] [¶] Thus, in order to prevail before us, plaintiff must demonstrate that there is no substantial evidence to support the trial court’s implicit finding that Bank’s contract, BAIS’s contract, and the U-4 form, were substantially one transaction and should be taken together. [Citation.] [¶] Plaintiff, however, fails to make a proper appellate argument. She cites the evidence favorable to her and ignores that in support of the judgment. [¶] It is sufficient to note that Bank and BAIS

are related companies that hired plaintiff at the same time in a dual capacity with principal responsibilities that required a securities registration. This evidence supports a finding that the employment agreement for salaried employees, registered representative agreement, and U-4 form, were parts of substantially one transaction and should be taken as one. Thus, the arbitration covenant in the registered representative agreement, U-4 form, and incorporated NASD provisions ran between plaintiff and Bank notwithstanding there was no specific arbitration provision in the employment agreement for salaried employees.” (*Id.* at pp. 1675-1676.)

We find the language of *Brookwood* a bit confusing. The opinion does not explain the trial court’s reasoning (for instance, whether by construing the agreements together the trial court determined that the Bank was a third party beneficiary of the arbitration agreements and could therefore invoke them to compel arbitration). (See Section IB, *post.*) Rather, after noting that the plaintiff failed to refer to any evidence to overcome the trial court’s ruling, the appellate court’s language appears to reason that merely *because* the separate agreements “were parts of substantially one transaction and should be taken as one,” the Bank was entitled to compel the plaintiff to arbitrate under the arbitration clauses of the agreements to which it was not a party. (*Brookwood, supra*, 45 Cal.App.4th at p. 1676.) But such an analysis misapprehends the effect of the interpretive canon of construing agreements arising from one transaction together. The canon is simply a method of helping a court determine the parties’ intent. Thus, the rule does not mean that simply because multiple agreements arising from a single transaction should be construed together, every term of each contract so construed applies to a nonparty to that contract, simply because that nonparty is a party to another of the contracts. Thus, we think that

Brookwood is more properly construed as reasoning that viewing the agreements together under the facts presented—the Bank and BAIS were “related companies that hired plaintiff at the same time in a dual capacity with principal responsibilities that required a securities registration”—substantial evidence supported the trial court’s conclusion that BAIS and the plaintiff intended to permit the Bank to invoke the arbitration clauses of the agreements to which it was not a party. (*Id.* at p. 1675.) So construed, *Brookwood* is in accord with the import of the doctrine of joint interpretation. To the extent *Brookwood* may be interpreted differently, we disagree with its analysis.

We also find *Brookwood* distinguishable in a critical aspect. At issue in *Brookwood* was whether the Bank, a non-signatory to the arbitration clauses, could compel the plaintiff, who was a signatory, to arbitrate her claims. In the instant case (at least with respect to the Doheny/Craft Agreement) the issue is the opposite: whether Doheny, a signatory to the arbitration clause of the Doheny/Craft Agreement, can compel a non-signatory, USC, to arbitrate Doheny’s claims. As we discuss in section IB, below, in connection with third party beneficiary principles, that is a determinative distinction.⁸

⁸ Doheny also relies on *Holguin*, *supra*, but it is inapposite. In *Holguin*, in purchasing a bundle of telephone, internet, and satellite services from AT&T sales agents, the plaintiffs entered five interrelated contracts with various entities: an order form, two service agreements, a promotion agreement, and a residential customer agreement. Although one of the plaintiffs was a party to each contract, the “counterparties” were different, and the contracts addressed “slightly different (though overlapping) areas of concern.” (*Holguin*, *supra*, 229 Cal.App.4th at pp. 1321-1322.) In instructing the jury on the plaintiffs’ breach of contract claim against the defendants, the court referred to a “contract” in the singular. On appeal, the defendants contended that the evidence did not show a sufficient interrelationship among the contracts for them to be considered a single contract, and that so construing the contracts was contrary to the parties’ intent. (*Id.* at p. 1321.)

B. *Third Party Beneficiary*

“The general rule is that only a party to an arbitration agreement may enforce it. [Citations.]” (*Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 837 (*Ronay*).) Here, Doheny invokes third party beneficiary principles to compel USC to defend against Doheny’s cross-complaint in an arbitration purportedly compelled by the arbitration clauses of the Doheny/Craft Agreement (to which USC was not a party), and the USC Craft Agreement (to which Doheny was not a party). But none of the authorities cited by Doheny support using third party beneficiary principles to force USC to arbitrate Doheny’s cross-complaint.

1. *Doheny/Craft Agreement*

In two situations, third party beneficiary principles create an exception to the general rule that only signatories can enforce an arbitration

The court of appeal rejected the contention. (*Ibid.*) In relevant part, the court reasoned that “[t]he Holguins ordered a bundle of telecommunications services, which was initiated by a single document, the Order Form. The remaining written instruments in evidence expressly reference or incorporate each other and have, as their counterparties, a number of related corporate entities. The evidence shows that the Holguins’ order was offered to them as a single transaction and consequently handled by all parties as such. The trial court did not err in describing the Holguins’ contract governing that transaction in the singular.” (*Id.* at p. 1323.)

We find *Holguin* inapplicable to the instant case. That the evidence in *Holguin* was sufficient to declare the various agreements to constitute one contract for instructing the jury on the plaintiffs’ breach of contract action against the defendants has no relevance to whether, in the present case on much different evidence, Doheny can compel USC to arbitrate under the Doheny/Craft Agreement to which USC was not a party. As we have noted, that contemporaneous agreements are construed together does not mean that each term of each agreement binds a nonparty simply because that nonparty is a party to another of the agreements.

agreement. First, for its own benefit, a third party beneficiary of an arbitration agreement can enforce it against a signatory. (*Valley Casework, Inc. v. Comfort Construction, Inc.* (1999) 76 Cal.App.4th 1013, 1021 [“a person who can show he is a third party beneficiary of an arbitration agreement may be entitled to enforce that agreement”]; see *Ronay, supra*, 216 Cal.App.4th at pp. 838-839 [to invoke the third party beneficiary exception to compel arbitration of claims made by a signatory to the arbitration agreement, the non-signatory beneficiaries were required to show that the agreement was made for their benefit; because the clause was intended to benefit a class of non-signatories to which they belonged, they were entitled to enforce the arbitration clause]; *Macaulay v. Norlander* (1992) 12 Cal.App.4th 1, 4 [in a lawsuit by investors against an “introducing broker,” the introducing broker, as a third party beneficiary of an arbitration agreement between the investor and a “clearing broker,” was entitled to invoke the arbitration clause to compel arbitration of the investor’s claims]; *Cione v. Foresters Equity Services* (1997) 58 Cal.App.4th 625, 629 [defendant employer in wrongful termination suit was entitled to compel arbitration of plaintiff’s claims as a third party beneficiary of the plaintiff’s arbitration agreement with the National Association of Securities].) This is simply a standard application of third party beneficiary principles, under which the beneficiary can enforce a contract made for the beneficiary’s benefit. (*Outdoor Services, Inc. v. Pabagold, Inc.* (1986) 185 Cal.App.3d 676, 681-682; see 1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 705, p. 762 [“The prevailing American rule . . . permits a third-party beneficiary under a contract to enforce it by a suit in his or her own name”]; Rest.2d Contracts, § 304, p. 448 [“A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty”];

Civ. Code, § 1559 [“A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it”].)

The second situation in which California law has applied third party beneficiary principles to compel arbitration is when a non-signatory, third party beneficiary makes claims seeking benefits under the contract against a signatory promisor. In that situation, the signatory promisor to the contract can compel the third party beneficiary to arbitrate the beneficiary’s claims. (*McArthur v. McArthur* (2014) 224 Cal.App.4th 651, 662 [rejecting contention “generally that contractual arbitration clauses are enforceable against third party beneficiaries of the contract,” and noting “the case law in fact requires that the third party *claim* benefits or rights under the contract before he or she will be bound to arbitrate”]; see also *Epitech, Inc. v. Kann* (2012) 204 Cal.App.4th 1365, 1371-1374 (*Epitech*) [short-term creditors of a bankrupt corporation sued corporation’s former financial adviser for fraud; defendant financial adviser argued that the claims arose from his performance under his contract with the corporation; however, he was not entitled to enforce the arbitration clause of that contract against the creditors, because the creditors were not third party beneficiaries of that contract]; *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1064 [respondent insurers of a maritime corporation sued appellant insurers of the corporation for equitable contribution; appellant insurers could not compel arbitration, because the arbitration agreement was in their contract with the corporation, and respondent insurers were not third party beneficiaries making claims under that agreement].) This, too, is an application of standard third party beneficiary principles. “A third party beneficiary cannot assert greater rights than those of the promisee under the contract. [Citation.] Because the

foundation of any right the third person may have is the promisor's contract, "[w]hen [a] plaintiff seeks to secure benefits under a contract as to which he is a third-party beneficiary, he must take the contract as he finds it. . . . [T]he third party cannot select the parts favorable to him and reject those unfavorable to him." [Citation.]' [Citation.]" (*Souza v. Westlands Water Dist.* (2006) 135 Cal.App.4th 879, 895 (*Souza*); see 9 Corbin on Contracts (2019) § 46.1 ["The remedies available to the beneficiary are exactly the same remedies that would be available to him if he were a contractual promisee of the performance in question."].) Thus, because the third party beneficiary has only the rights and remedies of the signatory promisee, and those rights and remedies include submitting contractual disputes to arbitration, the third party beneficiary who sues a signatory promisor for benefits under the contract can be compelled to arbitrate the claims.

In the instant case, with regard to the arbitration clause of the Doheny/Craft Agreement, neither of these third party beneficiary principles applies, because: (1) non-signatory USC (a purported third party beneficiary) is not seeking to enforce the arbitration clause of the Doheny/Craft Agreement against signatory Doheny, and (2) non-signatory USC (a purported third party beneficiary) is not suing signatory Doheny for benefits under the Doheny/Craft Agreement such that Doheny can compel arbitration of those claims.

Rather, Doheny is attempting a unique twist. Purporting to sue USC for breach of the Doheny/Craft Agreement, Doheny seeks to invoke its own arbitration agreement with the signatory promisee (Craft) to compel USC (the non-signatory, purported third party beneficiary) *to defend against Doheny's claims* in an arbitration. We are aware of no decision, and Doheny cites none, that supports Doheny's theory. Therefore, we reject Doheny's

attempt to invoke the arbitration clause of the Doheny/Craft Agreement to compel USC to arbitrate before the AAA.

2. *USC/Craft Agreement*

In its cross-complaint in the instant action, Doheny also purports to seek relief under the USC/Craft Agreement. Doheny argues that it is a third party beneficiary of that Agreement, and that therefore it is entitled to compel USC (a signatory to that Agreement) to arbitrate under the Agreement's arbitration clause. But Doheny has not shown that it is entitled to third party beneficiary status.

““The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract. [Citation.] If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person. The parties are presumed to intend the consequences of a performance of the contract.” [Citation.]’ [Citation.]” (*Souza, supra*, 135 Cal.App.4th at p. 891.) “Whether a third-party is an intended beneficiary . . . to the contract involves construction of the parties’ intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered.’ [Citation.]” (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 349.)

“Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract,’ which we review under the substantial evidence standard. [Citation.] . . . ‘[W]here . . . the issue [of whether a third-party is an intended beneficiary] can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, the

issue becomes one of law that we resolve independently.’ [Citation.]” (*Souza, supra*, 135 Cal.App.4th at p. 891.)

Here, to be a third party beneficiary of the USC/Craft Agreement, Doheny must prove that an intent to benefit Doheny appears from the terms of the contract, that is, that “the terms of the contract necessarily require the promisor to confer a benefit on” Doheny. (*Souza, supra*, 135 Cal.App.4th at p. 891.) But there are no terms under which USC, in the performance of its promises (which run to Craft), confers a benefit on Doheny. True, the Agreement contains Craft’s promise of a general release of Craft’s claims against Doheny (as well as USC), and to that extent Doheny receives a benefit. But this is a promise by Craft. Further, “it is not enough that the third party would incidentally have benefited from performance. [Citations.] ‘The circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement. The contracting parties must have intended to confer a benefit on the third party.’ [Citation.]” (*Ibid.*) Here, there is simply no benefit conferred on Doheny from USC’s performance that would entitle it to third party beneficiary status.

We find *Epitech* instructive. There, after the secured creditors of a bankrupt corporation sued the corporation’s financial adviser, the adviser argued that the suit arose out of his contract with the corporation, and sought to compel arbitration in reliance on the arbitration clause in that contract, contending that the secured creditors were third party beneficiaries. (*Epitech, supra*, 204 Cal.App.4th at p. 1371.) The court rejected the adviser’s argument, reasoning in part: “None of the tasks Kann [the financial adviser] agreed to do satisfied *any* obligation that AutoLife [the bankrupt corporation] owed to the secured creditors. AutoLife had no obligation to the secured

creditors to, for example, identify prospective investors and pitch the investment to them. AutoLife's only obligation to the secured creditors was to repay them, which Kann simply did not contract to do. [¶] While it is true that if Kann had successfully obtained financing, the secured creditors may well have been repaid, this simply would have been an incidental result of Kann's performance." (*Id.* at p. 1373; see also *Souza, supra*, 135 Cal.App.4th at p. 891 [landowners were not third party beneficiaries of contract between water district and landowners' tenants and therefore could not sue water district based on breach of contract between water district and tenants].) Similarly in the instant case, none of USC's duties to Craft under the USC/Settlement Agreement conferred a benefit on Doheny, and to the extent Doheny somehow might have benefitted from USC's performance, Doheny would have been merely an incidental beneficiary. Thus, Doheny is not a third party beneficiary of the USC/Craft Agreement, and cannot compel arbitration under that Agreement.

C. *Equitable Estoppel*

Doheny contends that equitable estoppel bars USC from denying that it was subject to the Doheny/Craft Agreement's AAA arbitration provision. But this doctrine applies only to estop a non-signatory plaintiff (or cross-complainant) from avoiding arbitration of claims the plaintiff (or cross-complainant) makes under the contract which contains the arbitration clause. "Equitable estoppel precludes a party from asserting rights 'he otherwise would have had against another' when his own conduct renders assertion of those rights contrary to equity.' [Citation.] In the arbitration context, a party who has not signed a contract containing an arbitration clause may nonetheless be compelled to arbitrate when he seeks enforcement of other

provisions of the same contract that benefit him. [Citation.]” (*Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1713.)

Here, USC’s complaint against Doheny is not before us; this appeal is from the trial court’s ruling denying Doheny’s motion to compel arbitration of its cross-complaint against USC. Thus, to the extent that Doheny contends that USC is estopped to resist arbitration before the AAA of USC’s complaint, that issue is not before us. To the extent Doheny contends that USC is estopped to resist arbitration of Doheny’s cross-complaint before the AAA, the principle of equitable estoppel does not apply.⁹

D. *Prejudice*

Doheny argues that because it prevailed in the AAA Craft Arbitration, it would suffer prejudice by being forced to relitigate essentially the same issues against USC in another forum before JAMS. But Doheny cites no case authority supporting the proposition that the prospect of relitigation requires

⁹ Even if USC’s complaint were at issue, equitable estoppel would not apply. “A nonsignatory plaintiff may be estopped from refusing to arbitrate when he or she asserts claims that are “dependent upon, or inextricably intertwined with,” the underlying contractual obligations of the agreement containing the arbitration clause. [Citation.]” (*Fuentes, supra*, 26 Cal.App.5th at p. 552.) USC is making no claims under the Doheny/Craft or USC/Craft Agreements. The causes of action in USC’s complaint are based on Doheny’s alleged breach of the 2013 Agreement, and seek damages as well as to preclude arbitration under the arbitration agreements of the Doheny/Craft and USC/Craft Agreements. To the extent the complaint refers to the Craft agreements, it does so only to explain that the Craft Arbitration to which USC objected was based on the Doheny/Craft Agreement. (See *id.* at p. 552 [““[E]ven if a plaintiff’s claims ‘touch matters’ relating to the arbitration agreement, ‘the claims are not arbitrable unless the plaintiff relies on the agreement to establish its cause of action’””].)

enforcement of an arbitration clause against USC to which it was not party. Doheny insisted on arbitration before the AAA. Whether USC could be compelled to arbitrate in that forum, as the trial court correctly found, was for the court to decide, not the arbitrator. (See *Benaroya v. Willis* (2018) 23 Cal.App.5th 462, 469 [“The question of whether a nonsignatory is a party to an arbitration agreement is one for the trial court in the first instance”].) Arbitration of Doheny’s cross-complaint against USC before JAMS following completion of the Craft Arbitration is an unfortunate consequence of Doheny’s decision to submit the question of arbitrability to the AAA arbitrator rather than the trial court.

III. *USC’s Cross-Appeal*

USC cross-appeals from the order denying its motion to compel arbitration of Doheny’s cross-complaint before JAMS. USC contends that Doheny’s cross-complaint arises from the 2013 Agreement, and that it is subject to the arbitration clause in that agreement, which specifies JAMS. We agree.

The arbitration clause of the 2013 Agreement (paragraph 24) provides in relevant part: “Except as expressly provided in this Agreement or in the Related Agreements, *any dispute respecting the terms or enforcement of this Agreement . . .* shall be resolved by final, binding arbitration pursuant to the JAMS Rules in effect at the time.” (Italics added.) The question is thus whether Doheny’s cross-complaint involves “dispute[s] respecting the terms or enforcement of” the 2013 Agreement.

We find this clause (“respecting the terms or enforcement of” the agreement) similar to arbitration clauses which “use the phrase ‘arising under *or related to*’ [the agreement] For a party’s claims to come within

the scope of such a clause, the factual allegations of the complaint ‘need only “touch matters” covered by the contract containing the arbitration clause.’ [Citation.] Further, courts have interpreted agreements with broad arbitration clauses like the one in this case to encompass tort, statutory, and contractual disputes that ““have their roots in the relationship between the parties which was created by the contract.”” [Citations.]” (*Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1052 (*Ramos*); see *AT&T Tech., Inc. v. Communications Workers* (1986) 475 U.S. 643, 650 [where clause required “arbitration of ‘any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder,” “only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail’ [citation]”].)

In the instant case, for several reasons, we disagree with the trial court’s conclusion that the 2013 Agreement simply settled the landlord-tenant dispute between USC and Doheny, and did not require arbitration of Doheny’s cross-complaint before JAMS.

First, the 2013 Agreement has provisions governing the “Ongoing Operating Parameters” of Doheny and USC’s relationship with each other. Of particular relevance here is Section 6(g) of the 2013 Agreement, which provides the terms on which, with the expiration of the Affiliation Agreement, Doheny would continue to pay USC for support of the Ophthalmology Department faculty.

Section 6(g) states: “Doheny agrees to reimburse the USC Department of Ophthalmology . . . , in a total cumulative amount of up to, but no more than, USD \$200,000.00 (the ‘Reimbursement Cap’) for salary expenses of certain Department faculty and staff . . . as such expenses, faculty and staff are designated by the current Chair of the Department and incurred *over the*

period of May 1, 2013 through September 30, 2013. Doheny will reimburse USC for the Ophthalmology Salary Expenses, subject to the Reimbursement Cap and the preceding sentence, within 30 days after receiving a reasonably detailed invoice from USC showing the individuals to whom USC paid the Ophthalmology Salary Expenses and the amounts USC has actually paid to each for Ophthalmology Salary Expense which it is invoicing Doheny. If USC's Ophthalmology Salary Expenses do not reach the Reimbursement Cap by September 30, 2013, then Doheny will be required to reimburse only that amount below the Reimbursement Cap that USC actually spent on Ophthalmology Salary Expenses before September 30, 2013 and nothing further.” (Italics added.)

Because Craft was a faculty member in the Ophthalmology Department, she is included in Doheny's promise of financial support under section 6(g). Also, section 6(g) addresses ophthalmology salary expenses for the period between May 1 and September 30, 2013, which overlaps with the period at issue in Craft's demand for AAA arbitration against Doheny: Craft alleged that Doheny breached the Doheny/Craft Agreement by ceasing to pay her interest from the Mary D. Allen Endowment as of December 31, 2012. (She also alleged that Doheny breached the Agreement by forcing her to vacate laboratory space at Doheny in 2014, preventing her from continuing to hold the title of Mary D. Allen Chair.)

Second, all of Doheny's claims against USC in its cross-demand for arbitration in the Craft Arbitration related to the 2013 Agreement. In its first cause of action for breach of contract, Doheny alleged that USC's failure to accede to Doheny's demand for defense and indemnity breached the 2013 Agreement. Obviously, this claim was a “dispute respecting the terms or

enforcement” of the 2013 Agreement, and thus was subject to its arbitration clause.

Similarly, Doheny’s cause of action for unjust enrichment in the Craft Arbitration was a “dispute respecting the terms or enforcement of” the 2013 Agreement. Doheny alleged it “provided USC substantial consideration in connection with the 2013 Settlement, and both USC and Doheny intended that the 2013 Settlement resolve with finality any further Doheny support for USC faculty related to the expired Affiliation Agreement. If the Arbitrator determines that Doheny must continue to make payments and provide other benefits to USC to support Dr. Craft’s research at USC (or payments or other benefits to Dr. Craft directly—which also benefit USC) while USC is not providing any service, work-product or value to Doheny in return, USC will be unjustly enriched by receiving benefits it bargained away in the 2013 Settlement.”

In the Craft Arbitration, Doheny also alleged claims seeking implied contractual indemnity from USC, and seeking declaratory relief that indemnity was due. Because, as we have explained, Craft’s claims for which indemnity was sought implicated Doheny’s obligations under section 6(g) of the 2013 Agreement, Doheny’s claims for indemnity were also necessarily intertwined with that agreement.

Third, in its cross-complaint against USC filed in the trial court that is at issue here, Doheny explained that its purpose (in relevant part) was “to ask the Court to order that all the parties to the 2004 Craft Settlement participate in a single, unified proceeding before AAA . . . as intended by the parties when USC drafted, negotiated and executed the 2004 Craft Settlement and solicited Doheny to be a party thereto.” Although all of Doheny’s claims against USC in the Craft Arbitration implicated the 2013

Agreement, in the cross-complaint Doheny purports to rely on the Doheny/Craft and USC/Craft Agreements. But given that the claims that Doheny made against USC in the Craft Arbitration had their roots in the 2013 Agreement, Doheny's attempt to recast the cross-complaint under the Doheny/Craft and USC/Craft Agreements rings hollow.

Thus, in the cross-complaint, in its first cause of action for declaratory relief, Doheny seeks a declaration of the rights and responsibilities of all parties to the Doheny/Craft and USC/Craft Agreements. However, as we have already concluded, Doheny cannot compel arbitration under those agreements. Moreover, as between Doheny and USC, the rights and obligations at issue have their roots in the 2013 Agreement.

In the second cause of action for breach of contract, Doheny alleges that USC agreed in the "2004 Craft Settlement" and in the Ryan Letter of June 2004 to be responsible for any benefits to Craft under the "2004 Craft Settlement." But, as we have explained, Craft's claim that Doheny breached the Doheny/Craft Agreement by terminating financial support implicates section 6(g) of the 2013 Agreement. Doheny cannot avoid arbitration of a claim that has its roots in the 2013 Agreement by styling it as an alleged breach of the Doheny/Craft and USC/Craft Agreements. (See *Ramos, supra*, 28 Cal.App.5th at p. 1053.) The same holds true for Doheny's causes of action for promissory estoppel and fraud of another, which allege that in entering the 2004 Craft Settlement, it relied to its detriment on USC's promise to be responsible for the support of Craft for which Doheny might be responsible under the Doheny/Craft Agreement. As we have noted, whether Doheny remained financially responsible for Craft's support is inextricably intertwined with the 2013 Agreement.

In its cause of action for indemnity, Doheny alleges that it was a third-party beneficiary of the USC/Craft Agreement, that USC refused Doheny's request for defense and indemnity in the Craft Arbitration, and that by doing so (as well as engaging in other conduct alleged in the breach of contract claim) USC "breached its obligations under the 2004 Craft Settlement and the June 2004 Letter."

This claim is a thinly veiled recasting of the claims for breach of contract and unjust enrichment that Doheny alleged in the Craft Arbitration. Of course, the breach of contract and unjust enrichment claims in the Craft Arbitration expressly relied on the 2013 Agreement. Purporting to rely on the Doheny/Craft and USC/Craft Agreements to seek indemnity here does not exclude the claim from coverage by the arbitration clause of the 2013 Agreement, because the claim by Craft for which Doheny seeks indemnity has its roots in section 6(g) of the 2013 Agreement.

In short, Doheny's causes of action against USC in the cross complaint ""touch matters' covered by"" the 2013 Agreement, and ""have their roots in the relationship between the parties which was created"" by that agreement in the wake of the expiration of the Affiliation Agreement. (*Ramos, supra*, 28 Cal.App.5th at p. 1052.) Thus, they necessarily fall under the arbitration clause of the 2013 Agreement as "dispute[s] respecting the terms or enforcement of" the 2013 Agreement. We conclude that the trial court erred in denying USC's motion to compel arbitration before JAMS.¹⁰

¹⁰ Because we resolve the cross-appeal based on section 6(g), we do not discuss USC's reliance on the other provisions of the 2013 Agreement (the release provision of paragraph 10, and the mediation provision of section 6(f)).

DISPOSITION

The order denying USC's motion to compel arbitration of Doheny's cross-complaint before JAMS under the 2013 Agreement is reversed, and the cause is remanded to the trial court for entry of a new order granting that motion. The order denying Doheny's motion to compel arbitration under the Doheny/Craft and USC/Doheny Agreements before the AAA is affirmed. USC shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.